Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1979

~~79~~-1475

No. .....

ALAN H. HARRIGILL, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioner, Alan H. Harrigill, Jr., respectfully prays that a Writ of Certiorari issue to review the Judgment herein of the Supreme Court of the State of Mississippi entered on March 12, 1980.

OPINION BELOW

The opinion of the Court below is reported in ..... So.2d .....

JURISDICTION

The Judgment of the Mississippi Supreme Court was made and entered on March 12, 1980, and is appended hereto. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

QUESTIONS PRESENTED

Did the Court below err in holding that the admission into evidence of oral statements made by the Defendant/Petitioner while he believed he had been granted immunity did not violate the Petitioner's rights to a fair trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution which provides in part as follows:

> * * * [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

2. The due process and equal protection clauses of the Fourteenth Amendment, United States Constitution which provide as follows:

> * * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was §97-19-39 of the *Mississippi Code of 1972*, which provides as follows:

> Every person who, with an intent to cheat or defraud another, shall designedly, by color of any false token or writing or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property or thing obtained.

STATEMENT OF THE CASE

The Grand Jury for the First Judicial District of Hinds County, Mississippi, returned its indictment No. P-847 against the Petitioner on July 5, 1978. This indictment charged that the Petitioner, from June 1, 1973, through August 17, 1973, did wilfully, unlawfully and feloniously, by common plan, scheme, design and by color of certain false representations in writing, make false and fraudulent representations to Bankers Trust Savings and Loan Association in loan applications and that Bankers Trust Savings and Loan Association was defrauded of $99,000 in violation of §97-19-39 of the *Mississippi Code of 1972, Annotated*. Prior to that time, on September 20, 1976, Petitioner's attorney, Samuel H. Wilkins, conferred with the chief investigator for the District Attorney in the First Judicial District of Hinds County, Mississippi, H. A. "Chip" Gusack, concerning potential criminal charges against the Petitioner. At that time, Mr. Wilkins was also representing William M. Faust who was indicted for the same offense as the Petitioner. At a second conference between Mr. Wilkins and Mr. Gusack that same day, Mr. Wilkins prepared a written memorandum outlining the fact that the Petitioner and William M. Faust were to be given full immunity in return for their cooperation

and exchange of information concerning the ongoing investigation into all matters related to Bankers Trust Savings and Loan Association.

Based on his understanding of the agreement with the District Attorney's office, Mr. Wilkins arranged for his clients to meet with Mr. Gusack and make a full disclosure of facts and documents which they had knowledge of or which were in their possession. Pursuant to the agreement, on September 21, 1976, Petitioner met with Mr. Gusack in a lengthy conference, allowed himself to be thoroughly interrogated by Mr. Gusack and provided Mr. Gusack with all documentary and oral evidence concerning the investigation of various Bankers Trust matters which he had in his possession. In addition, Petitioner provided certain documents and other written materials to his co-indictee, William M. Faust, who in turn provided this material to the District Attorney's office. Although Mr. Harrigill's immunity agreement was not upheld, Mr. Faust was ultimately granted immunity and was a witness for the State at the Petitioner's trial.

On July 11, 1978, Petitioner filed his motion to quash the indictment based on the immunity agreement which had arisen between defense counsel, Samuel H. Wilkins, and H. A. "Chip" Gusack. At the hearings on the motion held on July 7, and 21, 1978, Mr. Gusack stated that he could not have extended immunity to Mr. Harrigill and Mr. Faust because he did not have statutory authority to do so. Defense counsel, Samuel H. Wilkins, testified, however, that Mr. Gusack represented to him on September 20, 1976, that if Mr. Harrigill and Mr. Faust would make a full disclosure of the facts within their knowledge concerning the Bankers Trust investigation, immunity from any criminal charges would be extended to them. Mr. Wilkins also testified that on numerous occasions he had had immunity extended to clients by law enforcement

officials and prosecutors and that he had always, in the past, been able to rely on such offers of immunity.

On July 21, 1978, Petitioner filed his motion to suppress the statements and the physical evidence he had given H. A. "Chip" Gusack at their meeting on September 21, 1976. A hearing was held on the motion and it was overruled by the trial judge. At the trial, defense counsel renewed their objection to the introduction of the Petitioner's oral statements and to the evidence provided by the Petitioner with the understanding that he was to be granted immunity. Nonetheless, the documents were admitted and Mr. Gusack was allowed to testify as to statements allegedly made to him by the Petitioner.

The jury returned a verdict of guilty and Petitioner was sentenced to serve three years in the Mississippi Department of Corrections, to pay a fine of $50,000 and to be immediately disbarred from the practice of law.

REASONS FOR GRANTING THE WRIT

It is a well established rule that the Constitution does not allow the prosecution to use an involuntary confession. *Brooks v. Florida,* 389 U.S. 413, 10 L.Ed.2d 643, 88 S.Ct. 541 (1967); *Clewis v. Texas,* 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338 (1967), and *Brown v. Mississippi,* 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461 (1936). A defendant's constitutional rights are violated when his conviction is based, in whole or in part, on an involuntary confession. It does not matter if the confession is true or false.

In the instant case the prosecution maintained throughout all pretrial hearings as well as during the trial itself, that Mr. Gusack lacked the authority to grant immunity to Mr. Harrigill. Within the meaning of the rules excluding confessions made under a promise of immunity

held out by one in authority, a prosecutor, or a person representing him is a person in authority. Confessions induced by a promise of immunity made by prosecuting attorneys, their agents and authorized investigators, are inadmissible in evidence. Even so, Mr. Gusack's authority, or lack thereof, is not the crucial factor to be considered in determining the admissibility of Mr. Harrigill's statement to him. What is crucial, is that Mr. Harrigill *believed* that he had been granted immunity.

At the pretrial hearing on the question of admissibility, Mr. Wilkins, Mr. Faust and the Petitioner all testified that they believed the Petitioner had been granted immunity prior to his interview with Mr. Gusack on September 21, 1976. Mr. Harrigill's state of mind rendered any statement of confession he made on that date inadmissible in a subsequent trial because it cannot meet the standards of a "voluntary" confession.

Any use at a criminal trial of the defendant's involuntary statement is a denial of due process of law. *Mincey v. Arizona,* 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978). In *Jackson v. Denno,* 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774 (1964), this Court said:

> * * * [T]he overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence. (378 U.S. 390) (Citing cases)

The test to be applied in determining whether a statement is admissible is that it not be

> "'* * * extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor the exertion of any improper influence. * * *'" *Bram v. United States,* 168 U.S. 532,

> 542-543, 42 L.Ed. 568, 18 S.Ct. 183 (1897). See also *Brady v. United States,* 397 U.S. 742, 749-750, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970).

Anything furnished Mr. Gusack by Mr. Harrigill was done in reliance on Mr. Gusack's promise or on his belief that he was immune from prosecution.

In its opinion, the Mississippi Supreme Court stated that where there is conflicting evidence concerning the voluntariness of a confession, it will not set aside the decision of the trial court. This Petitioner concedes that there was conflicting evidence concerning the immunity agreement but submits that it is not unusual for there to be a conflict in the testimony regarding confessions. This Court in *Davis v. North Carolina,* 384 U.S. 737, 16 L.Ed.2d 895, 86 S.Ct. 1761 (1966) notes that it is almost invariably the case that there is a conflict in the testimony as to the events surrounding the interrogation where confessions are obtained through unobserved interrogations. The Court went on to say in that case and in many subsequent cases that it would examine the entire record in order to make an independent determination of the ultimate issue of voluntariness.

In *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967), this Court held that the question to be resolved is whether or not the accused was deprived of his free choice to admit, deny or refuse to answer. Mr. Harrigill agreed to make his statement in return for a grant of immunity. In other words, he had a choice between giving the statement or facing prosecution. Therefore, at all times during his interview with Mr. Gusack, this Petitioner believed he had been extended immunity.

The Petitioner believes that the following quote from *Jackson v. Denno,* supra, wherein the Court quoted its earlier decision in *Blackburn v. Alabama,* 361 U.S. 199, 206, 4 L.Ed.2d 242, 247, 80 S.Ct. 274, applied to Petitioner's situation.

"As reflected in the cases in this Court, police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will.

'[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion".'" (378 U.S. 389, 390)

Regardless of whether or not an immunity agreement existed, it is apparent that at the time the Petitioner gave his oral statement and provided documents of Mr. Gusack, he believed he had been granted immunity. Because of the promises which had been made to the Petitioner and the conditions under which his statements were made, this Petitioner submits that the admission of his statements at his trial violated his constitutional right to due process.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the Judgment of the Supreme Court of the State of Mississippi.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI
NO. 51,591

ALAN H. HARRIGILL

v.

STATE OF MISSISSIPPI

BEFORE SMITH, SUGG AND BOWLING
SMITH, PRESIDING JUSTICE, FOR THE COURT:

This is an appeal by Alan H. Harrigill from his conviction in the Circuit Court of the First Judicial District of Hinds County of the crime of false pretenses. For his said offense, he was sentenced to serve three years in the Mississippi Department of Corrections, to pay a fine of $50,000 and to be immediately disbarred from the practice of law.

Although several grounds for reversal are assigned, we agree with appellant's counsel that the case does not necessitate a lengthy or detailed statement of the facts.

Harrigill, a lawyer, was a member of a prominent firm and was serving as counsel for (now defunct) Bankers Trust Savings And Loan Association. He, William Marvin Faust and Ralph W. Blackmon were associated in forming several corporations, including Timberlake Company and Skyview Company. At the times involved, Faust was vice president and district loan manager for the Gulf Coast District of Bankers Trust. Blackmon was executive vice president in charge of financing and loans.

The substance of the State's case is set out in the State's brief as follows:

One Morris "approached Faust in 1973 regarding a loan to develop Beaumont Subdivision on property north of Gulfport, Mississippi. Although Morris paid $2,500.00 per acre for the land, Faust directed him to borrow $3,000.00 per acre for the purchase in order to give Faust, Blackmon and appellant a kickback of $99,000.00 or $500.00 per acre, which sum they had agreed was feasible. (A. 100, 101, 160) In return a loan of $1,851,700.00 would be approved for Gold Coast Enterprises, Inc., of which Morris owned one-third interest. (A. 160, 165) Faust, as the loan officer, prepared the loan and submitted it to his superior Blackmon who in turn passed it to the Executive Committee. (A. 97) The kickback was concealed on the closing statement within a $179,000.00 expenditure for engineering, grubbing, and clearing the land. (A. 109, 161) Morris then wrote a check for $99,000.00 to Timberlake Company (A. 161) which Faust received and delivered to Blackmon and appellant in Blackmon's office. It was then deposited directly to Skyview Company. (A. 101) Checks were later issued to Faust, Blackmon and appellant (Harrigill) each in the amounts of $15,000.00 and $18,000.00. According to Faust, appellant (Harrigill) handed him his two checks in a book while in Blackmon's presence."

The assignments of error will be dealt with separately.

(1) THE TRIAL COURT'S ACTION IN REFUSING TO QUASH THE INDICTMENT.

The first assignment challenges the trial court's action in denying Harrigill's motion to quash the indictment upon the special plea of the two year statute of limitations. Mississippi Code Annotated section 99-1-5 (1972).

It is argued that the indictment charges only a conspiracy, a crime not among those excepted from the operation of the two year period of limitations. There is no merit in the contention. Conspiracy is a complete offense

in itself, distinct from the commission of the crime contemplated by the conspiracy and does not become merged with that crime. Martin v. State, 197 Miss. 96, 19 So.2d 488 (1944), Moore v. State, 290 So.2d 603 (Miss. 1974), U. S. v. York, 578 F.2d 1036 (5th Cir. 1978), cert. den. 439 U.S. 1005, 99 S.Ct. 619, 58 L.Ed.2d 682 (1979), U. S. v. Cheers, 439 F.2d 1097 (5th Cir. 1971).

In *Prisock v. State*, 244 Miss. 408, 141 So.2d 711 (1962), Prisock was convicted of the statutory crime of false pretenses under then Mississippi Code Annotated, section 2149 (1942). On appeal it was contended in his behalf that the indictment was duplicitous in that it charged (1) a *conspiracy* to commit the crime of false pretenses as well as (2) an *attempt* to commit that offense. In *Prisock* the indictment stated:

> "[D]id willfully, unlawfully and feloniously conspire, willfully scheme and design, and willfully plan in concert with the other" . . .

a false automobile wreck to collect money under certain insurance policies. In rejecting Prisock's argument this Court said:

> The word "conspire", used in conjunction with "scheme, design and plan", concerning all of the indictees, was used in a generic sense to show the concert of action of the parties in planning the false wreck, obtaining the insurance, causing the faked accident, and making the claims. A fair construction of the indictment shows that defendant was charged and convicted of the crime of an attempt to commit false pretenses. The indictment did not charge an offense of conspiracy only. It averred overt acts manifestly constituting an attempt to commit the offense.
>
> (244 Miss. at 416, 141 So.2d at 714).

The fact that two or more persons enter into an agreement or plan to commit a felony, each playing a part, whether it be murder, false pretenses or some other felony, and carry out the plan and actually commit the crime, does not change the nature of the offense committed nor lessen the exposure of the plotters to punishment therefor.

It is next argued that the offense charged in the indictment is barred by the two year statute because it charges Harrigill with having been an accessory only, and that being an *accessory* is a separate crime, one which is not among those excepted from the operation of the statute. This position is not well taken. Section 97-1-3 Mississippi Code Annotated (1972) provides:

> Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not.

Prosecution of one who has been an accessory before the fact to the commission of one of the excepted felonies is not barred by the two year statute of limitations. His guilt is exactly the same as that of the principal and he suffers the same exposure to prosecution and punishment.

The indictment charged Harrigill with the crime of false pretenses proscribed by Section 97-19-39, a felony, and it was of that crime that he was convicted. In express terms, false pretenses is excepted from the two year statute of limitations.

(2) DENIAL OF APPELLANT'S MOTION FOR CHANGE OF VENUE.

A motion was made for a change of venue, based upon a contention that there existed such public resentment because of the failure of Bankers Trust Savings And Loan Association and such prejudice against those who might be accused of having been implicated in its failure, that the case could not be fairly tried in Hinds County.

An examination of the record made upon the motion, the voir dire of prospective jurors, and the testimony of witnesses, reflected that there was no widespread or significant knowledge or information among members of the public or among the prospective jurors, relating to the failure of Bankers Trust, or associating Harrigill's name with it or as having been involved in it, as would make it impossible or even difficult to select an impartial or unprejudiced jury. Jurors who stated that they might have read about it in the newspaper were not aware of specific details and had no knowledge of the facts of the case. There was no indication of prejudice on the part of the jurors. The situation, as reflected by the record, shows that the decision as to the change of venue was a factual one, one resting within the sound judicial discretion of the trial judge. There is nothing in the record to indicate that, in denying the motion, there was an abuse of such discretion or that Harrigill was prejudiced thereby. Anderson v. State, 246 Miss, 821, 152 So.2d 702 (1963), Shimniok v. State, 197 Miss. 179, 19 So.2d 760 (1944), Irving v. State, 361 So.2d 1360 (Miss. 1978).

There is no merit in the assignment that there was an abuse of judicial discretion by the trial court in the denial of the motion for a change of venue.

(3) THE ACTION OF THE TRIAL COURT IN ALLOWING ADDITIONAL QUESTIONING OF A JUROR.

Following selection of the jury, but prior to the beginning of the trial, the district attorney discovered that the son of one of the jurors was under an indictment for burglary. A request was made that in the light of that information, an inquiry be made as to the juror's competency by additional voir dire. The trial judge, noting that no testimony had been taken and that the juror's competency should be determined prior to the beginning of the trial, proceeded to question the juror upon the matter. The juror informed the judge that his son had been convicted of armed robbery and charged with other crimes but stated that nothing in these circumstances would cause him to favor the defense or be prejudiced against the State. He assured the court that he was not prejudiced against the judicial system or law enforcement officers and expected no benefit by voting for or against the State. The juror assured the district attorney that his son's charges and convictions would not influence his verdict. At the conclusion of this voir dire of the juror, appellant moved for a mistrial based upon the overruling of his objection. The motion for a mistrial was denied. There was no motion by the defense to excuse the juror or to strike him for cause.

Reopening under similar circumstances has been dealt with by this Court and the rule has been laid down that the reopening for further voir dire is a matter resting within the sound judicial discretion of the trial judge. This Court will not interfere unless there has been an abuse of that discretion. Sullivan v. State, 155 Miss. 629, 125 So. 115 (1929), Moser v. Brown, 249 N.W.2d 612 (Iowa 1977), State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977), Foley v. Revlon, Inc., 200 So.2d 627 (Fla. App. 1967).

In *Sullivan v. State, supra,* relied upon by appellant on this point, this Court said:

> The power to stand jurors aside after they have been accepted should be exercised with due caution, but whenever there is adequate reason for so doing, and where there is no error or harm apparent from the record resulting therefrom, this Court will not interfere with the discretion of the trial judge in his rulings.
>
> (155 Miss. at 637, 125 So. at 117).

The proper procedure under the circumstances related, if appellant considered that the juror was prejudiced or had been intimidated, was to move the trial judge to strike or excuse the juror for cause, as was done in *Walls v. State,* 371 So.2d 411 (Miss. 1979). This was not done, however. Moreover, we cannot say from the record that appellant was prejudiced by the action of the trial court in refusing to order a mistrial.

(4) ADMISSION OF THE TESTIMONY OF INVESTIGATOR GUSACK CONCERNING APPELLANT'S STATEMENT.

There was introduced at the trial a detailed statement given by Harrigill to investigator Gusack. In this statement, Harrigill related at length and in very considerable detail how he, Faust and Blackmon had collaborated in obtaining the $99,000.00 which was the fruit of the crime charged. He further told Gusack how he, Faust and Blackmon had handled the proceeds for the crime and how it eventually was divided between them - $33,000.00 each, paid in two checks, one for $15,000.00 and one for $18,000.00. The facts related to Gusack by Harrigill, if true, clearly established his guilt of the crime charged.

The question raised on appeal is that Harrigill had been induced to make the statement by a promise of immunity.

The statement was taken by Gusack after repeated warnings to Harrigill as required by Miranda, and was recorded on tape as it progressed. Testimony relating to Harrigill's contention that he had been promised immunity in exchange for his confession, and that he had given the statement only because of such promise, is in direct conflict with opposing testimony, including that of Gusack. Thus a factual issue was created as to admissibility for determination by the trial judge, as trier of facts. Evidence supporting the voluntary character of the statement and supporting the State's contention that it had not been induced by a promise of immunity, is neither unreasonable nor implausible. It amply supports the finding that the statement had been voluntary and that there had been no promise of immunity. In this connection, the testimony of Gusack is supported by the taped record of his interview with Harrigill. A decision of such a question of fact on conflicting evidence will not be set aside by this Court where there is substantial and believable evidence supporting it as there was in this case.

We have considered each of the questions raised and we find no merit in any of them. Harrigill's statement and the testimony of Faust overwhelmingly support the jury's finding that Harrigill was guilty of the crime charged. It appears that Harrigill was properly indicted, fairly tried and convicted and that no prejudicial error occurred in the course of his trial. The conviction and sentence must, therefore, be affirmed.

AFFIRMED.

PATTERSON, C. J., ROBERTSON, P. J., SUGG, WALKER, BROOM, LEE, BOWLING AND COFER, JJ., CONCUR.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Robert E. Womack, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing is a true and correct copy of the opinion delivered by the Court in the cause therein stated, as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 13th day of March A.D., 1980

/s/ Robert E. Womack
Clerk Supreme Court

(Seal)